2006

Oksana Pearce v. Loren E. Pearce : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

OKSANA PEARCE,

Petitioner/Appellee,

vs.

LOREN E. PEARCE,

Respondent/Appellant

Appeals Case No. 200610077 CA
Third District Court No. 034900448

BRIEF OF APPELLEE

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APPEAL FROM THE ORDER OF THE SECOND JUDICIAL DISTRICT COURT OF UTAH, WEBER COUNTY, THE HONORABLE PAMELA HEFFERNAN, PRESIDING.

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STATEMENT OF JURISDICTION

Rules 3(a) and 4(a) of the Utah Rules of Appellate Procedure, and Utah Code Ann. §78-2a-3(2)(c), confer jurisdiction upon this court to hear this appeal.

STATEMENT OF ISSUES & STANDARD OF REVIEW

Issue No. 1: Father Failed to Marshal the Evidence in Support of the Verdict and Demonstrate that the Evidence is Insufficient Viewed in the Light Most Favorable to the Trial Court's Findings. An appellate "marshal all of the facts used to support the trial court's finding and then show that these facts cannot possibly support the conclusion reached by the trial, even when viewed in the light most favorable to appellee [Mother]." Wayment v. Howard, 2006 UT 56; 144 P.3d 1147, footnote 4, citing Chen v. Stewart, 2004 UT 82, P 76, 100 P.3d 1177 (requiring appellant to marshal the evidence when the legal standard is extremely fact sensitive).

STATEMENT OF THE CASE

The parties are husband and wife having been married in Utah on the 28th day of July 1997 and are the parents on one child, Maria Gloria Pearce, whose date of birth is April 24, 1999. Irreconcilable differences arose between the parties and a Verified Complaint for Divorce was filed by Mother on March 6, 2003, in the Second District Court, in and for Weber County, State of Utah. R.O.A., 001. On March 17, 2003, Father also filed a Complaint for Divorce. R.O.A. 021. The two complaints were consolidated into the first filed Case No. 034900448 on April 3, 2003. R.O.A. 033.

The domestic court commissioner issued temporary orders at a hearing on May 7, 2003, stated the parties' daughter would reside with Mother; the parties would have joint legal custody and awarded Father standard visitation plus one additional overnight each week. R.O.A. 127.

Father appeared pro se at the pre-trial on January 28, 2004, where the domestic court commissioner made recommendations as a custody evaluation. R.O.A. 177. The trial court denied Father's first motion to bifurcate on June 8, 2004 and ordered the parties to complete the custody evaluation as previously ordered. R.O.A. 205.

The trial court granted Father's second motion to bifurcate and directed the parties to complete the custody evaluation at a hearing on September 28, 2004. R.O.A. 218. Father was awarded a Decree of Divorce on October 26, 2004, which reserved the issues relating to the parties' minor child and division of real and personal property. R.O.A. 234.

Father again appeared pro se at a hearing before the domestic court commissioner on November 24, 2004. R.O.A. 280 and a subsequent hearing on April 27, 2005 wherein Mother was awarded $600.00 in attorney's fees and the court recommended Father seek legal counsel. R.O.A. 446 - 447.

On December 8, 2005, Mother filed a response to Father's document titled "Response to Respondent Document "Motion for Issuance of Order to Show Cause, in Re Modification of Temporary Custody Order." R.O.A. 553. Exhibit "C" to that Response is a copy of the divorce between Father and his first wife, which ordered Father (as the respondent in the Florida divorce) to pay $392.00 per month, per child to his first wife or a total of $1,176.00

per month, and ordered Father to pay his first wife the sum of $1,000.00 per month as permanent alimony. [emphasis added.] R.O.A. 575, paragraphs "C" and "D." Exhibit "C" also contained a copy of a stipulated order, signed by Father herein, which states that the 17th Judicial Circuit Court in Broward County, Florida "shall retain jurisdiction of the parties and the subject matter of this action ... " R.O.A. 570, paragraph 2. Exhibit "C" also contained an accounting from the Broward County Family Law Case History, dated 6/28/2005, indicating Father was $52,049.31 in arrears in his child support to his children from a prior marriage. R.O.A. 582. Father appeared pro se at a hearing before the domestic court commissioner on December 14, 2005, wherein Father's request for a change in custody and increase in parenting time was denied. R.O.A. 647.

Father also appeared pro se at the pre-trial/custody evaluation on February 22, 2006, during which time the parties did not reach agreement and the issues of custody, visitation, financial accounting, personal and real property division, child support, attorney's fees and the division of the escrow account were certified for trial. R.O.A. 654.

The trial in this matter came before the court on July 5 and 6, 2006. Father in his Brief, page 6, paragraph 2, states that he is appealing "the award of sole physical and legal custody to Appellee" (Mother), which is a portion of the final order of the Second District Court. Father does list the admission of financial information set forth in Mother's exhibits as an issue and asks this Court to reverse the entire judgment or, if remand is necessary that this court set aside the entire ruling and remand to "another Judge for a fair and impartial ruling on the merits."

SUMMARY OF THE ARGUMENT

Mother's Issue No. 1. Father appears not to understand that a marshaling obligation requires defendant to "ferret out a fatal flaw in the evidence" and become a "devil's advocate" Wayment v. Howard, 2006 UT 56; 144 P.3d 1147, ftn 6. Instead, set forth "carefully selected facts and excerpts from the record," and provided new evidence to support his position that the trial court committed judicial error, abused its discretion, misinterpreted or violated rules, made improper statements, disregarded evidence, entered insufficient findings and violated Father's constitutional rights as a parent. Father did not meet the marshaling standard set forth in Wayment.

Father's Issue No. 1. Whether Trial Court Erred in Admitting Evidence in Violation of U.R.C.P. Rules 26(a)(4) and 37(f). Neither party complied with Rule 26(a)(4) and 37(f) of the Utah Rules of Civil Procedure, and it was within the discretion of the trial court to allow both parties to present their witnesses and exhibits at trial. Father stipulated, even after being specifically asked by the trial court, to all of Mother's exhibits being admitted. Tr. page 51, line 7 thru 20; and Tr. page 120, lines 12 thru 20. Father has failed to marshal any evidence that, if he had objected to Mother's exhibits, there would have been any grounds for the trial court to sustain the objection or that the outcome would have been any different.

Father's Issue No. 2. Whether the Court Violated Rule 610 of the Rules of Evidence and Committed Cumulative Error by Allowing Evidence Designed to Denigrate and Embarrass Appellant with Respect to His Religious Beliefs. Rule 4-903 governs the factors that must be considered in a custody evaluation and one of those factors (subsection

(5)(E)(vi)) is "religious compatibility with the child." As such, evidence regarding Father's religious beliefs was properly before the trial court as to on the issue of custody of the parties' minor child. Father failed to marshall the evidence as to this issue.

Father's Issue No. 3. Whether the Court Made Contradictory and/or Improper Statements that were Prejudicial to the Appellant and that Constituted Plain Error and/or Abuse of Discretion. Father picked only the portion of the record that supports his position and failed to marshal the evidence as to this issue. There was a lengthy discussion between Father and the trial court, after a lengthy discussion (beginning on Tr. page 148, line 10, and ending on page 153, line 25), specifically informed in five different ways that he could continue his cross examination of Mother. Again, Father failed to marshall the evidence that any statements by the trial court were prejudicial to Father, or constituted plain error or abuse of discretion.

Father's Issue No. 4. In Awarding Sole Custody to the Petitioner/Appellee, Whether the Court Abused its Discretion and Erred as to Law in Declaring the Petitioner to be the More Cooperative Parent. This issue is confusing at best. If, as set forth in Father's Brief, Father is the Petitioner, he cannot be the Appellee. Further, the trial court made now such declaration as to the Petitioner, either in its Decision, dated July 21, 2006, or in the written Findings of Fact and Conclusions of Law, dated October 13, 2006. Father failed to marshall the evidence that the trial court abused its discretion or erred as to law.

Father's Issue No. 5. Whether the Court Erred in Disregarding Evidence of Violent and Uncooperative Behavior on Part of Oksana's Mother and its Harmful Effect on the Best Interests of the Child. The record is clear that the trial court considered all of the factors set

forth in Rule 4-903 of the Utah Rules of Civil Procedure. R.O.A. 716, paragraph 6 thru 725, paragraph N. Father failed to marshall the evidence to support this issue.

Father's Issue No. 6. Whether the Court Erred in Finding a Distinct Possibility that Abuse May Have Occurred by Appellant in the Fact of the Manifest Weight of the Evidence that Preponderates to Their Falsity.

Father's Issue No. 7. Whether False Accusations of Abuse are Grave Enough to Operate Against the Best Interests of the Child and Require a Different Award of Custody.

Father's Issue No. 8. Whether the Court Erred in Relying on the Pregnancy of Appellant's Wife as a Reason for Denying Custody of Maria to Appellant While Disparately Failing to Consider Concurrent Pregnancy of Appellee.

Father's Issue No. 9. Whether the Court Erred and/or Abused its Discretion in Finding that Appellant is not a Responsible Parent Based on What the Court Deemed to be Credible Evidence that Appellant had not Paid his Child Support From a Previous Marriage.

Father's issues five through nine relate to issues the trial court did or did not consider in the determination of the custody award. The trial court specifically it concurred with the custody evaluator. R.O.A. 725, paragraph 2, lines 7 thru 9. The trial court's ruling followed the ruling of the Utah Supreme Court in Tucker v. Tucker, 910 P.2d 1209 (Utah 1996), finding that the trial court "must be guided at all times by the best interests of the child." R.O.A. 717, paragraph 3 thru 718, line 5. Father failed to marshall the evidence that the trial court erred or abused its discretion as to the factors that were considered by the trial court in awarding custody.

Father's Issue No. 10. In the Alternative, Whether the Trial Court's Award of Sole

Custody to the Appellee and the Consequences of the Court's Order Comply with the Constitutions of the United States and Other Relevant Statutes and Whether any Statutes or Color of Law Relied on by the Court are in Constitutional Compliance. The Utah Supreme Court has considered the issue of parent time and visitation statutes in Utah and found that "[t]he goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause" and such statutes are constitutional. Uzelac v. Thurgood, 2006 UT 46; 147 P.3d 538. Father failed to marshall the evidence as to this issue.

ARGUMENT

MOTHER'S ISSUE I. FATHER FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF THE VERDICT AND DEMONSTRATE THAT THE EVIDENCE IS INSUFFICIENT VIEWED IN THE LIGHT MOST FAVORABLE TO THE TRIAL COURT'S FINDINGS.

Father must "marshall all of the facts used to support the trial court's finding and then show that these facts cannot possibly support the conclusion reached by the trial, even when viewed in the light most favorable to [Mother] ." Wayment v. Howard, 2006 UT 56; 144 P.3d 1147, footnote 4, citing Chen v. Stewart, 2004 UT 82, P 76, 100 P.3d 1177 (requiring appellant to marshal the evidence when the legal standard is extremely fact sensitive); see, also, Garlett v. Garlett, 2002 UT App 228; citing Moon v. Moon, 1999 UT App 12, P 24, 973 P.2d 431.

Father has asked this court to consider the trial court's application of the facts to the statutes and governing case law, which "is a mixed question of fact and law, and the factual basis underpinning the decision is subject to a clearly erroneous standard." Saleh v. Farmers

Ins. Exch., 2006 UT 20, 133 P.3d382, Utah Adv. Rep. 11, citing State v. Pena, 869 P.2d 932, 935-36 (Utah 1994). Pursuant to the Utah Supreme Court's holding in State v. Pena, 869 P.2d 932 (Utah 1994), "all disputes in the evidence [are resolved] in the light most favorable to the trail (sic) court's determination." See, also Pennington v. Allstate Insurance, Inc., 973 P.2d 932, 937 (Utah 1988), holding "[i]n sum, we will not overturn a trial court's factual findings if its account of evidence is plausible in the light of the record viewed in its entirety."

In prosecuting his appeal based on an assertion of an erroneous factual determination, Father must "first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co., 899 P.2d 766,773 (Utah 1995). In addition, the Utah Court of Appeals ruled, in Oneida/Slic v. Oneida Cold Storage & Warehouse, Inc., 872 P.2d 1051, 1053 (Utah App. 1994), an appellant may not present an argument which is "nothing more than an attempt to re-argue the case before this court -- a tactic we reject.")

> The appealing party has the heavy burden of marshaling the evidence in support of the verdict and of showing that the evidence, viewed in the light most favorable to the verdict, is insufficient. Tingey v. Christensen, 1999 UT 68, 987 P.2d 588.

In Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987), the Utah Supreme Court examined contentions on appeal that the decision below was legally incorrect. On this issue of the requirement to marshall the evidence, the Newmeyer court stated:

> It was for the trial court to resolve [the conflicts in the evidence]. We will not overturn a factual resolution unless the appellant first marshals all the evidence

> supporting the trial court's finding and then demonstrates the evidence, when compared to contrary evidence, is so lacking as to warrant the conclusion that clear error has been committed.

Anderson v. City of Bessemer, 470 U.S. 546 (1985), states:

> The [clearly erroneous] standard plainly does not entitle a reviewing court to reverse the findings of the trier of fact because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court.

Father selected only that the facts from the record that supported his positions. The only cite to the record as to the alleged violation of U.R.C.P. Rules 26(a)(4) and 337(f) is R.206:7. As to Father's Father failed to point out to this Court that the cite to the Trial Transcript is Father's response as to the trial court's inquiry as to whether or not Father had any questions for Mother's Attorney as to his Affidavit of Attorney's Fees. The entire response was: "No, Your Honor, because I just haven't had time to review it. I do dispute it in its entirely though as far as my obligation to pay." Tr. 206 lines 7-9. As the trial court did not order Father to pay Mother's attorney's fees, obviously this cite does not support Father's objection to the admission of all of Mother's Exhibits.

As to Father's objections to the personal letter (both as a violation of the Utah Rules of Civil Procedure and Rule 610 of the Rules of Evidence (Father's Issue 2), the quit claim deed, the Notice of Lien and the divorce decree from Father's first wife, Father stipulated, even after being specifically asked by the trial court if he objected, to all of Mother's exhibits being admitted. Tr. page 51, line 7 thru 20. The trial court explained the steps for admitting exhibits into evidence, including the fact that the trial court was unsure if Father would have any objections, at Tr page 120, lines 6 thru 18. Father confirmed that he stipulated to

Mother's book of exhibits at Tr page 102, lines 19 and 20. Father has done the very thing prohibited by Oneida/Slic – attempt to re-argue the case below after he stipulated to the entry of Mother's exhibits.

Father is correct that pro se litigants are "accorded every consideration that they may reasonably be indulged." [emphasis added.] Lundahl v. Quinn, 2003 UT 11, 67 P.3d 1000. However, Father apparently failed to consider the additional ruling of the Utah Supreme Court in Lundahl as to pro se litigants:

> Doubtless the shortcomings in the Fenleys' prosecution of their case resulted in large part from their pro se status. However, even though this court "generally is lenient with pro se litigants" and is "understandably loath to sanction them for a procedural misstep here or there," we cannot advocate on their behalf or ignore the requirements necessary to preserve an issue for appeal. Lundahl v. Quinn, 2003 UT 11, P4, 67 P.3d 1000. Rather, "'as a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar.'" Id. at P3 (quoting Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah 1983)). "If a litigant, for whatever reason, sees fit to rely on himself as counsel, he must be prepared to accept the consequences of his mistakes and errors." Nelson, 669 P.2d at 1220 (Hall, C.J., concurring and dissenting) (emphasis omitted).

Tolle v. Fenley, 2006 UT App 78, 132 P.3d 63. The record is clear that, as to the issue of exhibits, Father was more granted more than "reasonable indulgence" by the trial court as to issue of the admission of exhibits.

Father's implication that the trial court was somehow prejudiced against him because the findings of the trial court made no mention of Father stating "he had Christ personally come and visit him" or the custody evaluator restating statements from Father's first wife that Father knew a young man who "came to live on earth from another planet" is an unwarranted and unsubstantiated attack on the judiciary. The Utah Supreme Court, in Peters

v. Pine Meadow Ranch Home Ass'n., 2007 UT 2; 151 P.3d 962, recently founds such tactics were a violation of the Rules of Appellate Procedure:

> To make bald and unfounded accusations of judicial impropriety in briefs filed with this court is not such an avenue. In so doing, counsel has overstepped the bounds of appropriate appellate advocacy.
>
> Rule 24(k) of the Utah Rules of Appellate Procedure provides that "[a]ll briefs under this rule must be . . . free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, . . . and the court may assess attorney fees against the offending lawyer." Counsel's unfounded accusations regarding the supposed improper motives of the court of appeals panel are irrelevant to the questions upon which we granted certiorari. Further, those accusations are scandalous in that they are defamatory and offensive to propriety.
>
> In his briefs, counsel argues that the court of appeals panel that decided these cases committed both legal and factual errors. As noted, it was fully appropriate for counsel to do so. But he has taken the additional step of claiming that these errors were intentional and the result of improper motives. In support of these accusations, counsel offers nothing beyond the fact that the errors were made.

Father admits that the trial court made no mention of what he characterizes as denigrating and embarrassing evidence regarding his religious beliefs in its findings. As in Peters, no reasonable person could have drawn any hint of prejudice or unfairness or partiality on the part of the trial court by reading the findings in this matter. Father's allegations were not an "innocent mistake" and there is no explanation in Father's Brief as to why he so mischaracterized the trial court's findings. The trial court actually found

> that the parties are unable to cooperate with each other and make joint decisions regarding the minor child. Thus, under Utah Code Ann. §30-3-10.2, which the Court finds is an important custody factor in this case, the Court hereby finds that no joint custody, of any type, would be appropriate in this case. In addition to the "cooperation factor" contained in Utah Code Ann. §30-3-10.2(h), discussed above herein, the Court also finds that joint physical custody would not be workable in this case due to the problem associated with

> geographic proximity, with Petitioner (Mother) residing in Davis County and with Respondent (Father) residing in Utah County. Given these two factors, as well as the fact that the minor child, Maria, is of school age, a joint physical custody arrangement is simply cannot work.

R.O.A. 771, paragraph 5.

Father continued his mischaracterization of the record and the trial court in Issue III. Father's cite to the Trial Transcript omits the fact that five times the trial court instructed Father that he could either continue now or call Mother as his own witness:

(1) if it's [abuse] is going to be a big issue then I'll let you go through it, Tr. page 151, lines 14 and 15;

(2) that the trial court didn't want Father to feel like he wasn't given an opportunity to present what he wanted to say, Tr. page 151, lines 19 and 20;

(3) you can call her (Mother) again if there's additional things that you don't feel you've been able to accomplish this afternoon, Tr. page 152, lines 4 thru 6;

(4) I'm not precluding from going into it further if you feel, based on the other evidence, that you need to recall her, Tr. page 153, lines 1 thru 3; and

(5) I'm not saying you can't get into it again if you want to call her as your own witness., Tr. page 153, lines 17 and 18.

Father failed to marshall the evidence that any statements by the trial court were prejudicial to Father, or constituted plain error or abuse of discretion. The five page discussion clearly indicates that the trial court continued to explain trial procedure and give Father every opportunity to continue his questioning Mother at that time or call Mother as his own witness.

Father's Issues 4, 5, 6, 7, 8 and 9 deal with the issue of factors considered by the trial court in awarding custody. Again, Father failed to marshall the evidence as to these issues. In fact, considerable discretion is given to the trial court in making custody decisions. See Sigg v. Sigg, 905 P.2d 908, 916 (Utah Ct. App. 1995). As in Rose v. Rose, 2006 UT App 358, the trial court in this matter considered and incorporated into its Findings of Fact the custody evaluation report, which complied with Rule 4-903 of the Utah Rules of Judicial Administration. The trial court considered all factors set forth in Rule 4-903, including the child's preference; the benefit of keeping siblings together; the relative strength of the child's bond with one or both of the prospective custodians; the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted; factors relating to the prospective custodians' character or status or their capacity or willingness to function as parents; moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking or other causes; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including in extraordinary circumstances stepparent status; financial condition; and evidence of abuse of the subject child, another child, or spouse; and any other factors deemed important by the evaluator, the parties, or the court. R.O.A. 716, paragraph 6 through 725 paragraph N. The court also considered the recommendation of custody evaluator. R.O.A. 725, paragraph 2.

The trial court set forth its reasons for awarding custody to Mother, both in it

Decision and written findings. Specifically, the trial court agreed with the conclusions of the custody evaluator and adopted the recommendation. Trial court also discussed other factors it considered in finding that custody with Mother was in the best interest of the child, including that disrupting the continuity of her life is not in the child's best interest. R.O.A. 744, paragraph 5. The trial court's findings, together with the conclusions adopted by the trial court from the custody evaluation are sufficient to support its award of custody to Mother and the custody award should be affirmed. Further, Mother should be awarded her Attorney's fees as a sanction against Father because his brief was extraordinarily deficient. The arguments in Father's brief were, for the most part, unsupported by any specific legal citation or analysis. Nipper v. Douglas, 2004 UT App 118, 497 Utah Adv. Rep. 11, 90 P.3d 649, cert. denied, 94 P.3d 929 (Utah 2004).

The constitutionality of custody and parent time statutes has been considered by both the Utah Supreme Court and the United States Supreme Court.

> The state's power to protect the best interests of minor children also extends to divorce proceedings and custody determinations. See Palmore v. Sidoti, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984) (reversing a state court's decision to give a father custody based on the mother's interracial marriage and stating that "[t]he goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause "); cf. Utah Code Ann. § 30-3-5(5)(a) (Supp. 2005) ("In determining parent-time rights of parents . . . the court shall consider the best interest of the child."). In some cases, states have extended this authority to include the protection of relationships that children have formed with third parties. See Campbell v. Campbell, 896 P.2d 635, 643 (Utah Ct. App. 1995) (recognizing the state has a legitimate interest "in fostering relationships between grandparents and their grandchildren"); cf. Utah Code Ann. § 30-3-5(5)(a) (requiring courts to consider the best interests of the child in determining the visitation rights of immediate family members).

CONCLUSION

It is undisputed that the trial court found (and Father clearly demonstrates in his brief), that the parties are unable to cooperate with each other and make joint decisions regarding the minor child. Father did not dispute that joint physical custody would not be workable in this case due to the problem associated with geographic proximity, with Mother residing in Davis County and with Father residing in Utah County or the additional fact that the parties' minor child is of school age, were the reasons the trial court found that a joint physical custody arrangement is simply cannot work. The judgment of the trial court should be affirmed.

Father failed to marshal the evidence as to any of his issues on appeal and the ruling of the trial court should be affirmed.

Father's brief is confusing, attempts to retry the case below, attempts to introduce new evidence, is inflammatory and makes outrageous and unfounded allegations against Mother and the trial court. Although Father is pro se, his requests for relief from this Court are far beyond the reasonable consideration given pro se litigants. Mother should be awarded her attorney's fees and costs incurred in responding to these unsupported arguments and defending the judgment of the trial court on appeal. Wallis v. Thomas, 632 P.2d 39 (Utah 1981).

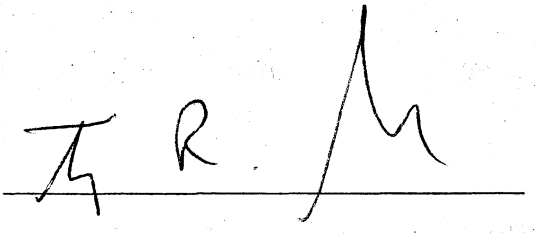
DATED this 21 day of June, 2007.

Terry R. Spencer
Attorney for Appellee

CERTIFICATE OF SERVICE

Terry R. Spencer, counsel for Appellee, hereby certifies that I personally caused to be mailed by first class mail, postage pre-paid thereon, two and correct copies of the foregoing Brief of Appellee to the following on the 21 day of June, 2007:

LOREN E. PEARCE, PRO SE,
650 South 1600 East
Pleasant Grove, Utah 84062



ADDENDUM

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
COUNTY OF WEBER, STATE OF UTAH

OKSANA PEARCE, Petitioner, vs. LOREN PEARCE, Respondent.	**DECISION** Case Number: 034900448 DA Judge Pamela G. Heffernan

The court took evidence at trial and then took the matter under advisement. This decision will be broken down by the issues that were tried.

1. Division of Personal Property

Petitioner's Exhibit 1, Tab 5 sets forth the proposed division of personal property which was not disputed by respondent. It appears to be an equitable division based on the values presented. Respondent will owe petitioner $2,638.65 to equalize their respective positions.

2. Division of Marital Accounts and Stock

Petitioner's Exhibit 1, Tab 6 sets forth the proposed division which was not disputed by respondent. The court notes that respondent presented no evidence during his testimony or by documents that would cause this court to question the distribution as set forth. While respondent attempted to argue some of the issues in his closing argument, the court did not consider his statements as evidence since no supporting evidence was presented during the trial. Respondent was aware that petitioner was going to argue these economic issues since he acknowledged them

during the first day of trial but then presented nothing to rebut petitioner's position.

Given the distributions made to date from the assets listed and taking account that there remains $10,000.00 in Petitioner's Counsel's Trust Account, petitioner shall receive $9, 050.00 and respondent shall receive $950.00.

3. Division of Martial Debts and Other Debts

Petitioner's Exhibit 1, Tab 7 sets forth the debts. Respondent did not dispute the amounts owed. Therefore, respondent owes petitioner $3,255.90.

4. Division of Marital Residence Proceeds

Petitioner's Exhibit 1, Tab 8 sets forth the proposed division of marital residence proceeds. Respondent does not dispute the association fees and unpaid mortgage payments of $817.76 and $3, 999.99 respectively. Implicit in Tab 8 is the recognition that respondent disputes the allocation of reduction in principle amount while he alone was responsible for the mortgage payments. That amount is $7,000.00. The court recognizes that respondent may have tried to argue this during closing arguments but was not permitted to do so. In light of the recognition in petitioner's exhibit of respondent's position on this, the court finds that although the parties may have been married while respondent was making the mortgage payments, petitioner did not contribute to that and, therefore, respondent should be given full credit for the reduction in the principle on the mortgage which resulted from him alone making the payments that resulted in the reduction of principle. Therefore, respondent should be credited with $7,000.00 and

petitioner's portion should be reduced from the amount in Exhibit 1, Tab 8 to $4,816.76.

5. Attorney's Fees

Petitioner requests full reimbursement for her attorney's fees incurred in this action. The award of attorney's fees is governed by U.R.C.P. 102. Specifically, the rule requires the following to justify an award of attorneys fees: lack of financial resources to pay fees and costs, ability of the other party to pay costs and fees, the necessity of the costs and fees and the reasonableness of the costs and fees.

In the instant case, while it is clear that respondent's income is substantially higher than petitioner's, petitioner's family income is substantially higher than respondent's family income. Furthermore, the statement of expenses for petitioner (note that the heading refers to respondent's revised expenses which appears to be an error) set forth in Exhibit 1, Tab 11 includes expenses for the child but does not account for the child support income. Therefore, the alleged shortfall is not really an accurate picture of petitioner's financial situation. Furthermore, respondent testified that his income is fully exhausted paying his own family expenses. Therefore, the court finds that while the fees and costs may have been necessarily incurred and the amount is reasonable, there has not been an adequate showing of necessity or ability to pay. Each party will be expected to pay their own costs and fees.

6. Child Custody

There is only one child of issue from the marriage–Maria Pearce born April 24, 1999. Through the protracted litigation of this divorce, there have been different positions taken by

respondent as to custody of Maria. It appears from the history that initially respondent was seeking joint legal and physical custody, but he then indicated that he was not seeking custody, and later that he sought full custody of Maria. While respondent has an explanation for his changing positions, that is the history of the case.

With regard to the issue of joint custody, it was clear at trial that respondent no longer wished to be awarded joint custody, and petitioner adamantly objected to any form of joint custody. In light of current positions of the parties, the court will not spend a great deal of time analyzing whether joint custody in any form is appropriate in this case. While U.C.A. § 30-3-10.2 sets forth many factors to consider in determining the appropriateness of joint custody, it is clear from the history in this case as well as the evidence presented at trial that joint custody is not a workable arrangement in this case. Most notably, subsection (h) states: "the past and present ability of the parents to cooperate with each other and make decisions jointly". The court finds that this important factor is absent in this case. Because of the parties continuing conflict and inability to resolve issues jointly and cooperatively, the court finds that joint custody would not be appropriate. In addition, there is the problem of geographical proximity. Petitioner resides in Davis County and respondent in Utah County. A joint physical custody situation is simply not workable given that factor as well as the fact that Maria is school age.

In deciding which parent is best suited to receive sole custody of the child, the overriding standard is what is in the best interests of the child. Rather than referring to which party wins in a custody dispute, the court is interested only in the child's welfare. The allocation of custody is

not one which is based on allocation of a piece of property or even the balancing of parental wishes, rights and responsibilities. The focus is solely on the child's needs. While there are many considerations that go into an analysis of this, the child's best interests always take precedence over a parent's needs and desires. The following will be a discussion of various factors that I have taken into account in arriving at my decision.

A. Preference of the child.

The court did not interview Maria and, therefore, relies on the custody evaluator's report (hereafter referred to as " Mr. Potter's report" found in Exhibit 1, Tab1). Maria was cautious about stating a preference out of fear of hurting either parent. However, she did express a comfort level with living with her mother, petitioner, and her half-sister and stated that she would miss having daily contact with them.

B. Keeping siblings together.

If custody is granted to petitioner, Maria would continue living with her half-sister Alina. If custody were granted to respondent, Maria would begin living with her half-brother Amman. From the testimony presented at trial, the bond between Maria and Alina is quite strong compared to that with Amman. The positive effect of allowing Maria and Alina to remain together in the same household would appear to outweigh the benefit of a resuming of a living arrangement with the half-brother.

C. Relative strength of the child's bond with the prospective custodial parents.

Although Maria appeared to Mr. Potter to be more reserved at her father's home than at her mother's home, she did not exhibit fear or dislike of either parent. Mr. Potter had difficulty determining to which parent she was more bonded.

D. Maintaining a custody arrangement where the child is happy and well-adjusted.

Because Maria is happy living with petitioner mother, it likely would result in a major adjustment to move to a new county, attend a new school, establish a live in relationship with a new mother (respondent has since remarried and he and his new wife are expecting a child) who is herself adjusting to a new country, marriage and the expectancy of a first child. While such an adjustment is not impossible, the negative consequences tend to outweigh maintaining the status quo where she is adjusted and is happy. Furthermore, Maria herself expressed to Mr. Potter a greater comfort level living with her mother.

E. Primary care giver.

Petitioner has been the primary care giver throughout the child's life. Although there is evidence that respondent was involved in the child's care, he was employed outside the home and, therefore, the bulk of time spent giving child care fell on petitioner.

F. Parent most likely to allow the child frequent and continuing contact with the noncustodial parent.

Mr. Potter expressed reservations about both parents as to their willingness to encourage Maria to have a good relationship with the other parent. He states: "Neither parent seemed to

focus on Maria's right and need to have as unfettered access to both her biological parents as possible. Maria appeared rather to be the focal point for their strong negative feelings about each other." He also observed that petitioner mother would likely adhere to the court's order for parent time but would not go beyond the specifics of the order. He further questioned whether respondent's stated willingness to allow Maria to spend time with her mother was genuine or mere lip service. It appears to be a stalemate when it comes to this issue as to which parent would be superior in facilitating the noncustodial parent-child relationship. That being said, the court observes that whichever parent receives custody, he or she will be expected to abide by the court's order that will recognize the importance of the child establishing and maintaining a meaningful relationship with both parents.

G. Moral character and emotional stability.

There were serious accusations of misconduct by both parents against each other. As to respondent father there were very serious accusations of domestic violence and child abuse. As to the alleged child abuse, the stepdaughter Alina testified that she and her half brother Amman were regularly beaten with a belt for misbehaving. The half brother testified that he had not been so abused. Petitioner testified about escalating violence in the home during the marriage including the beating of the children, violent rages, and brandishing of guns. Respondent's first wife testified that respondent had abused her and the children. The divorce decree from the dissolution of that marriage does recognize that domestic violence was unrefuted. DCFS investigated claims of abuse in Utah and found them to be unsubstantiated. Respondent denies

the accusations.

These accusations are very serious and troubling. While there is no firm evidence that these episodes of abuse occurred, there is a distinct possibility that they may have occurred particularly since they are referred to in the divorce decree from respondent's first marriage.

As to Maria, however, there is no evidence that she has been abused by respondent. Allegations of neglect were made but they did not appear to be life threatening or of a continuing nature.

The court is not able to determine whether the allegations of violence and abuse are accurate given the state of the evidence. It cannot make findings based on possibility. While this may not seem like a satisfactory conclusion for the parties, the court is not clairvoyant and cannot go beyond the evidence presented at trial in making a determination. At best the evidence on this issue is evenly weighed thereby making a conclusive determination impossible.

An additional allegation against respondent is that he is in arrears on child support from his first marriage in the astronomical amount of $100,324.47. Currently there is a Notice of Lien on file with the Weber County Recorders Office dated April 27, 2006 and filed on May 8, 2006. Respondent's first ex-wife testified at trial and confirmed that the amount is owed by respondent. Respondent denies that he owes this money and states that has overpaid his child support to his first wife. The court finds that there is credible evidence that respondent is indeed significantly in arrears on child support owed to his first family. The failure to support his family from his first wife casts respondent in a negative light and must be taken into consideration by the court as a

factor in determining who is the more responsible parent to have custody of Maria.

Respondent alleges against petitioner that she lived with her current husband prior to marriage. He also claims that while living in the Ukraine and in anticipation of moving to the United States petitioner concealed from the biological father of her oldest daughter, Alina, that she planned to leave the country with that child and she submitted documents to the government seeking permission to leave the country using a fictitious name.

As to the first allegation, even assuming that it is true, the situation has been remedied, and petitioner has married the individual with whom she had been living. The home they have created appears to be a stable one both physically and emotionally. While the court does not condone cohabitation by nonmarried individuals particularly when there are minor children in the household, petitioner's new spouse testified at trial and presented himself as a very capable, caring and responsible individual who has created a good relationship with Maria. Therefore this factor will not be given great weight.

As to the second allegation, there was conflicting evidence as to whether petitioner needed to obtain government permission to leave the Ukraine with Maria. She testified that she determined that she did not need to obtain a permit and went through legitimate channels when she immigrated to the United States. There is no evidence that Alina's biological father has made a claim that Alina was kidnaped or that he objected in any way. The court is somewhat concerned, however, with the allegations supported by emails from petitioner to respondent that petitioner concealed her intentions of taking Alina out of the country without disclosing that to the biological father. Any concern created that petitioner, if given custody of Maria, will take her out

of the country to live is mitigated by testimony of petitioner that she is a U.S. citizen and has made this country her permanent home. The court also may require that each parent give permission if Maria is to be taken out of the country.

As to the issue of emotional stability, the court is not in a position to conclude that either party is emotionally unstable. Some testimony at trial was given to suggest that respondent is delusional and prone to emotional outbursts, however, no definitive evidence of that was presented, and Mr. Potter did not conclude there was such a problem.

H. Duration and depth of desire for custody.

Although respondent's position has changed a couple of times over the duration of this litigation, both parents at this time exhibit a strong desire for custody.

I. Ability to provide personal rather than surrogate care.

Both respondent and petitioner work outside the home and both are remarried. Petitioner's husband also works outside the home. Respondent's wife does not.

If respondent is granted custody, his new wife will be responsible for the bulk of personal care for Maria. His new wife is currently pregnant, is a recent immigrant to the United States, and their marriage is recent. The adjustments she is making are significant and the birth of their child will undoubtedly require further substantial adjustments.

Mr. Potter implied that any advantage of having a stepmother care for Maria over surrogate care would be outweighed by the stresses the stepmother is currently facing in adjusting to her

new life in the United States. The court notes, however, that there is no evidence that the stepmother has not established a good relationship with Maria.

J. Impairment of either party to function as a parent.

Mr. Potter identified no deficiencies in either parent.

K. Reasons for relinquishing custody in the past.

This is not a factor in this case.

L. Religious compatibility with the child.

Petitioner and respondent were both members of the LDS church. Since their separation, petitioner has returned to the Eastern Orthodox faith as is her current husband. Respondent and petitioner have both expressed concerns with the conflict this may present for Maria. However, respondent testified that he has no problem with Maria attending the Eastern Orthodox church so long as she is able to maintain a relationship with the LDS faith. Any conflict that may be present will be there regardless of which parent is given custody since there is no longer a commonality of religion. Each parent will receive a directive of the court to allow cooperation in allowing the child to be exposed to both religions.

M. Kinship.

Both petitioner and respondent are Maria's biological parents

N. Financial condition.

Petitioner's family income exceeds that of respondent's by about double the amount. Respondent testified that he can barely make ends meet with his current income and lives paycheck to paycheck. It would appear, then, that petitioner in her current situation is better able to meet Maria's financial needs, particularly if respondent remains current on his child support.

Decision Regarding Custody:

Mr. Potter, the custody evaluator, concluded and recommended that the petitioner mother be granted custody of Maria with standard visitation granted to respondent father. The court concurs. Petitioner has been Maria's primary caretaker since birth. She has a daughter from another marriage to whom Maria has bonded with in a significant fashion. To break that bond with a sibling and disrupt the continuity of Maria's life would not be in her best interest. There is no evidence that petitioner is a deficient parent in any respect. In addition, her new spouse has demonstrated a willingness to support Maria both financially and emotionally and a bond has developed in that relationship as well.

It is also clear to the court that respondent father has an abiding motivation to maintain a good and meaningful relationship with Maria. Hopefully his good intentions will be backed up by maintaining financial support for her as well. His parent time should be facilitated by petitioner and cooperation will be essential for that to be maintained. It is in Maria's best interest to maintain a close bond with both parents and to do so will require both parties to cooperate

with each other to that end.

The parent time schedule will be followed by both parties as set forth by statute.

Transportation to and from respondent's home will be accomplished by respondent. However, for the midweek visit, petitioner will transport Maria to and from a mutually agreed upon pickup and drop off location in Salt Lake County.

Maria will not be allowed to dictate whether she wants to go with respondent during his parent time nor should she be discouraged in any way. Rather, the parties will make her available for the exercise of parent in a timely way.

Neither party will remove Maria from the country for any reason without permission of the other party.

Respondent will not use any form of corporal punishment on Maria nor allow her to witness corporal punishment on anyone else. Petitioner will also abide by this directive.

The statutory requirements regarding relocation as set forth in UCA §30-3-37 will be strictly followed by both parents.

7. Child Support:

Monthly child support will be calculated according to the following undisputed income figures of the parties:

Petitioner $30,350.00 yearly/ $2529.17 monthly

Respondent $75,000 yearly/ $6250.00 monthly

The parties did not present their positions on the issue of who should be allowed the tax deduction for Maria. Unless the parties have agreed otherwise, they shall alternate years in which the deduction is taken. Whoever took the deduction for the year 2005 will defer to the other parent for the year 2006. They shall alternate every year thereafter. Other issues also were not specifically addressed by the parties. The standard statutory provisions regarding insurance, daycare, medical expenses, etc. shall be incorporated into the findings and decree. Child support shall continue for the period of time set forth in the statute.

Counsel for petitioner shall prepare the Findings of Fact and Decree consistent with this decision.

DATED this 17 day of July, 2006

PAMELA G. HEFFERNAN
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Decision, first class mail and postage prepaid, to the following parties this 21st day of July, 2006.

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IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH.

OKSANA PEARCE,

Petitioner,

-vs-

LOREN PEARCE,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. 034900448

10/17/06

Judge Pamela G. Heffernan

THE ABOVE CAPTIONED MATTER, having come on regularly for trial on the 5th and 6th day of July 2006, before the Honorable Pamela G. Heffernan, District Court Judge; Petitioner was present and was represented by counsel, Terry R. Spencer; Respondent was present and represented himself, pro se; and the Court having heard the testimony of the parties as well as various third party witnesses, and having found jurisdiction proper to enter findings and orders herein; now enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Petitioner was for a period of three or more months immediately prior to the filing of the Complaint in this action, a resident of Weber County, State of Utah.

2. The parties are husband and wife having been married in Utah on the 28th day of July 1997.

3. Irreconcilable differences have arisen between the parties which has made continuation of the marriage impossible and the marriage no longer viable.

4. There has been one child born as issue of this marriage, namely: Maria Pearce, whose date of birth is April 24, 1999. During this litigation, the Court finds that Respondent took several positions as it related to the issue of custody of the parties' subject minor child. First, Respondent sought the "joint legal" and "joint physical" custody. Second, Respondent indicated that he was not seeking any form of custody. Third, Respondent sought "sole legal" and "sole physical" custody over the parties' minor child. During each of these time periods, Respondent claimed to have an explanation for his changing positions on the issue of custody.

5. As to the issue of "joint legal" and "joint physical" custody over the parties' minor child, Maria, the Court hereby finds that at the time of trial it was clear that Respondent no longer wished to be awarded any form of "joint legal" or "joint physical" custody over the minor child. Further, the Court finds that Petitioner consistently opposed any form of joint custody. Given the positions of the parties on the issue of "joint custody" and the testimony presented, the Court hereby finds that the parties are unable to cooperate with each other and make joint decisions regarding the minor child. Thus, under Utah Code Ann. §30-3-10.2, which the Court finds is an important custody factor in this case, the Court hereby finds that no joint custody, of any type, would be appropriate in this case. In addition to the "cooperation factor" contained in Utah Code

Ann. §30-3-10.2(h), discussed above herein, the Court also finds that joint physical custody would not be workable in this case due to the problem associated with geographic proximity, with Petitioner residing in Davis County and with Respondent residing in Utah County. Given these two factors, as well as the fact that the minor child, Maria, is of school age, a joint physical custody arrangement is simply can not work.

6. In deciding which parent should be awarded sole physical custody over the parties' minor child, the Court finds that the overriding standard is "what is in the best interest of the minor child." Thus, the focus is on the child's needs and not on the balancing of parental wishes, rights and responsibilities. While there are many factors which go into the "best interests" analysis, the following is a discussion of the factors the Court hereby takes into account in awarding Petitioner sole custody in the matter before this Court:

a. **Preferences of the Child:** The Court did not interview the minor child, Maria, and therefore the Court relies on the preference materials contained in the Custody Evaluation completed by Rhett Potter. In the Custody Evaluation, Rhett Potter determined that Maria was cautious about stating a preference for either parent out of fear of hurting either parent. However, Maria did state that she was comfortable living with Petitioner (her mother) as well as her half-sister, and having daily contact with both of them. Thus, this factor strongly favors Petitioner as the custodial parent.

b. **Keeping Siblings Together:** The child in question, Maria, has a half -sister in Petitioner's home and a half-brother in Respondent's home. Based on the testimony presented,

the Court hereby finds that Maria's bond with her half sister, Alina, is "quite strong" in comparison with that bond she has with her half-brother, Amman. Therefore, the positive effects of allowing Maria to remain with Alina in the same household significantly outweigh the benefit of having Maria resume a living arrangement with Amman. The Court specifically finds that to break the bond Maria has with Alina would not be in the best interest of Maria. Thus, this factor favors Petitioner as the custodial parent.

c. **Relative Strength of the Child's Bond with the Prospective Custodial Parents.** The Court finds, based on the written Custody Evaluation and the testimony of Rhett Potter, that Maria is more reserved at Respondent's home. However, based on the testimony of Mr. Potter, the Court is unable to determine to which parent, Maria was more relatively bonded with.

d. **Maintaining a Custody Arrangement Where the Child is Happy & Well Adjusted.** The Court, based on the written Custody Evaluation and testimony of Rhett Potter, hereby finds that the parties minor child, Maria, is happy and well adjusted living with Petitioner (her mother). The Court also finds that it would be a great adjustment for Maria to reside with Respondent because that would require a new a school, a new relationship with Respondent's new spouse (who herself is adjusting to life in a new Country), and a new sibling (the first child of Respondent's new spouse). Although this adjustment would not be impossible, the negative consequences in Respondent's home outweigh maintaining the status quo in Petitioner's home.

e. **Primary Care Giver.** The Court finds, based on the testimony of the parties and Rhett Potter, that Petitioner has been Maria's primary care giver throughout the minor child's life. Although evidence was presented to the Court that Respondent was involved in the child's life, evidence was also provided that Respondent was employed outside the marital home and thus, the bulk of the care giving responsibilities were completed by Petitioner. Thus, this factor favors Petitioner as the custodial parent.

f. **Parent Most Likely to Allow the Child Frequent and Continuing Contact with the Non-Custodial Parent.** The Court finds, based on the testimony of the parties and Rhett Potter, that both parties expressed some unwillingness to encourage the parties minor child, Maria, to have a good relationship with the other parent, and that Maria appeared to be the focal point for each party's strong negative feelings about the other party. However, the Court finds, based on the testimony of Petitioner, that Petitioner would be more likely to adhere to the Court's Order, even if she were unwilling to go beyond those Orders. It appears this factor is a stalemate when it comes to which parent would be more likely to facilitate frequent and continuing contact with the other party.

g. **Moral Character & Emotional Stability.** Based on the testimony of both parties, as well as the testimony of Rhett Potter, the Court hereby finds that there were allegation of misconduct by both parties against the other party. These allegations and findings are discussed below:

(1) **Testimony Against Respondent Re: Current Marriage**: There were serious allegations of both domestic violence and child abuse raised against Respondent. In support of the child abuse allegations, the Court received testimony by Petitioner's daughter, Alina, as to her and her step brother Amman being beating with a belt by Respondent for misbehaving. This testimony was rebutted by Amman, who testified that the beatings had not occurred.

(2) **Testimony Against Respondent Re Former Marriage**: Petitioner testified about escalating violence in the home during the marriage, including beating of the children, violent rages, and brandishing of guns. This testimony was supported by testimony of Tonya Pearce, Respondent's first wife, who testified that Respondent abused her and her children during Respondent's first marriage. This testimony was further supported by Tonya Pearce's Decree of Divorce, which recognized that domestic violence was both existing and un-refuted. Further, there was additional testimony by Tonya Pearce against Respondent that Respondent is in arrears in his child support obligations from his first marriage in the astronomical sum of $100,324.47. This claim was supported by a Notice of Lien filed with the Weber County Recorder's Office, dated April 27, 2006 and filed May 8, 2006.

(3) **Findings by the Court re: Respondent**: As to the testimony concerning child abuse, the Court hereby finds there is no firm evidence to support that these episodes of abuse had occurred, however, the Court hereby finds that there is a distinct possibility that they "**may have**" occurred, particularly since they are referred to in the Decree of Divorce

from Respondent's first marriage. However, as to the parties' minor child, Maria, there has been no evidence that she has been abused physically abused by Respondent. (Allegations of emotional abuse of Maria were also made, but they did not appear to be life threatening or of a continuing nature.) Further, the Court hereby finds credible evidence that Respondent is indeed significantly in arrears on child support owed to his first family. The Court finds that the failure to pay support to his first family, including support to his former wife Tonya Pearce, casts Respondent in a negative light and must be taken into consideration by the Court as a factor in determining who is the more responsible parent to have custody of Maria.

(4) **Testimony Against Petitioner**: Respondent testified that: (a) Petitioner lived with her current husband prior to marriage; (b) that Petitioner concealed, from the biological father of her oldest child, Alina, the fact that she planned to leave the Ukraine with that child, and (c) that Petitioner submitted documents to the Ukraine Government seeking to leave the Country under a fictitious name.

(5) **Findings by the Court Re: Petitioner**: As to the first allegation, even if it were true, the Court finds that it was remedied by Petitioner's marriage to Tony Zapassoff. Together, Petitioner and Tony Zapassoff have created a stable household, both physically and emotionally. As to the second allegations, there was conflicting evidence as to whether there was any concealment, but there was no evidence that Alina's biological father had either objected to the move to the United States or that Alina was in any way kidnapped.

(6) **Conclusion on Character & Emotional Stability Element.** Given the discussion above herein, the character issue favors Petitioner for the reasons stated above. As to the issue of emotional stability, the Court is not in a position to conclude that either party is emotionally unstable. The Court finds that there was, however, some testimony to suggest that Respondent is delusional and prone to emotional outbursts. Notwithstanding this fact, no definitive evidence was presented by the parties or Rhett Potter to conclude that there was such a problem.

h. **Duration and Depth of Desire for Custody**: Although Respondent's position had changed a couple of times as it related to the issue of custody, the Court finds that both parents expressed a strong desire for custody at the time of trial. Overall this factor does not favor either parent as the custodian.

i. **Ability to Provide Personal Rather than Surrogate Care.** Following the presentment of testimony by the parties and various third-parties, the Court hereby finds that: (a) both parties work outside the home, as does Petitioner's spouse; (b) the child attends school where Petitioner teaches; (c) Respondent's new spouse is both pregnant and new to this Country; (d) any advantage of having the stepmother provide care is outweighed by the stresses that the stepmother is currently facing in the adjustment to life in the United States and the birth of her first child. Overall this factor favors Petitioner as the custodian parent.

j. **Impairment of Either Party to Function as a Parent.** The Court hereby finds that no deficiencies exist in either parent. Thus, this factor does not favor either parent.

k. **Religious Compatibility With the Child.** The Court finds that both parents were members of the LDS Church during their marriage. The Court further finds that since their separation, Petitioner has returned to the Eastern Orthodox Faith. Based on the testimony of Respondent that he has no problem with the parties minor child, Maria, attending the Eastern Orthodox faith, so log as she is able to maintain a relationship with the LDS faith, this factor is not an issue.

l. **Financial Condition.** Petitioner's family income exceeds that of Respondent's family income by about double the amount. Petitioner's new spouse has demonstrated a willingness to support Maria, both financially and emotionally and a bond has developed in that relationship as well. The Court finds, based on Respondent's testimony, that Respondent can barely make ends meet with his current income and lives paycheck to paycheck. Thus, the Court finds that Petitioner is in a better position to meet the needs of the minor child, Maria's. The Court finds that this is possible so long as Respondent remains current on his child support. Thus, this factor favors Petitioner as the custodial parent.

7. Summarizing the issue of custody, the Court finds that based on the factors discussed above, as well as the recommendation of Rhett Potter, that Petitioner be awarded the sole legal and sole physical custody over the parties minor child, Maria. In support of this custody award, the Court hereby orders the following:

a. Petitioner should be ordered to abide by the Court's order concerning parent-time for Respondent, and both parents should be ordered to cooperate with each other in order to continue these parental bonds.

b. Respondent should be ordered to be current and stay current in his child support.

c. Both parents are to provide written permission before Maria is permitted to leave the United States with either parent.

d. Respondent will not use any form of corporal punishment on Maria nor allow her to witness corporal punishment on anyone else. Petitioner will also abide by this directive.

8. Respondent should have parent-time at such times and places as the parties may agree, but in no case less than that specified in U.C.A. §30-3-35, if the parties are unable to agree on an alternative parent-time schedule. Further, the parent-time guidelines contained in U.C.A. §30-3-33 should be applicable to the parties' parent-time relationship. The uniform parent-time schedule under Utah Code Ann., §30-3-35 is as follows:

a. Midweek: One weekday evening, specified, from 5:30 p.m. - 8:30 p.m., with Petitioner transporting Maria to a mutually agreeable location in Salt Lake County for this visit only;

b. Alternate Weekends: Friday 6:00 p.m. to Sunday 7:00 p.m.;

c. Holiday Visitation: 6:00 p.m. the day before the holiday to 7:00 p.m. of the holiday, unless specified otherwise. Further, holidays take precedence over the weekend visitation and the alternating weekend schedule shall not change.

(1) Odd numbered years: Human Rights Day, Easter from Friday at 6:00 p.m. to Sunday at 7:00 p.m., Memorial Day from Friday at 6:00 p.m. to Monday at 7:00 p.m., July 24th to 11:00 p.m., Veteran's Day, Day before or after the child's birthday from 3:00 p.m. to 9:00 p.m., and the first half of the Christmas vacation, including Christmas Eve and Christmas Day to 1:00 p.m.

(2) Even numbered years: New Year's Day, President's Day, July 4th to 11:00 p.m., Labor Day from Friday at 6:00 p.m. to Sunday at 7:00 p.m., Columbus Day, UEA weekend from Wednesday at 6:00 p.m. to Sunday at 7:00 p.m., the child's actual birthday to 9:00 p.m., Thanksgiving from Wednesday at 7:00 p.m. to Sunday at 7:00 p.m., and the second half of the Christmas vacation beginning at 1:00 p.m. Christmas Day.

d. Father's Day: With father from 9:00 a.m. to 7:00 p.m.

e. Mother's Day: With mother from 9:00 a.m. to 7:00 p.m.

f. Summer visitation: Four weeks during summer or, if year round, one-half of school breaks. The custodial parent should be allowed two-weeks uninterrupted. Notification of summer visitation or vacation weeks with children should be provided in writing to the other parent at least 30 days in advance.

g. Telephone: Reasonable telephone contact shall be not more than once a day and between the hours of 6:00 p.m. and 8:00 p.m., except for emergencies involving the child. The child may call either parent without restriction.

h. Pickup/return: The noncustodial parent should pick up the child at the times specified and return the child at the time specified, and the child's regular school hours should not be interrupted.

i. Special events: The custodial parent should notify the noncustodial parent within 24 hours of receiving notice of all significant school, social, sports, and community functions in which the children are participating or being honored, and the noncustodial parent should be entitled to attend and participate fully.

j. Records/reports: The noncustodial parent should have access directly to all school reports including preschool and day care reports and medical records and shall be notified immediately by the custodial parent in the event of a medical emergency.

k. Change of address: Each parent should be ordered to provide the other with his or her current address and telephone number within 24 hours of any change.

l. Religious holidays: Each parent should be entitled to an equal division of major religious holidays celebrated by the parents, and the parent who celebrates a religious holiday that the other parent does not celebrate should have the right to be together with the children on the religious holiday.

n. Special Occasions. Further, special consideration should be given by each parent to make the child available to attend family functions including funerals, weddings, family reunions, religious holidays, important ceremonies, and other significant events in the life of the children or in the life of either parent which may inadvertently conflict with the visitation schedule.

m. Moves by Either Party: The statutory requirements regarding relocation, should one occur, as set forth in Utah Code Ann. §30-3-37, will be strictly followed by the parents.

9. Beginning July 1, 2006, Respondent should be ordered to pay child support to Petitioner in the sum of $547.00, in conformance with the sole custody worksheet and $6,250.00 per month for Respondent and $2,529.17 per month for Petitioner in conformance with the provisions of Utah Code Ann., §§78-45-7, et seq. . Respondent should be ordered to pay said child support on or before the first day of each month in which the support is due. The child support shall be paid until the child attains the age of 18 years or graduates from high school in her normal and expected year of graduation, whichever last occurs.

10. Each party should be ordered to pay one-half of each month's actual work-related child care expenses reasonably incurred. The monthly day care reimbursement will occur no later than the tenth day of the month following the month in which the day care was incurred.

11. Petitioner should be entitled to mandatory income withholding relief pursuant to Utah Code Ann. §§62A-11-401, et seq., and Universal Income Withholding pursuant to Utah Code Ann. §§62A-11-501, et seq., Utah Code Ann.

12. Petitioner should be ordered to provide health insurance for the parties' minor child. Each party should be ordered to pay one-half of said premium, as well as one-half of any out-of pocket medical, dental, optical, orthodontic or psychotherapeutic expenses not covered by insurance. Either party who incurs medical expenses anticipated to be uncovered by insurance, should provide written verification of the cost and payment of medical expenses to the other party within thirty days of payment. The obligations of the parties to maintain health insurance and share uncovered medicals should continue until the child attains the age of 18 years or graduates from high school in the child's normal and expected year of graduation, whichever last occurs.

13. Respondent should be ordered to maintain in full force and effect, and neither pledge, hypothecate nor encumber, a policy of insurance on his or her own life having a benefit payable on death in the minimum sum of $100,000.00, naming the child of the parties as the sole beneficiary

14. During even numbered tax years, Petitioner should be awarded the right to claim the parties' child, as a dependent for the purpose of the calculation of her state and federal income taxes, commencing with the tax year 2004. So long as Respondent is current in his child support, Respondent shall be permitted to claim the parties' minor child in odd numbered tax years.

15. Both parties are able-bodied and employable and both hereby waive any claim for alimony from the other forever.

16. As per Petitioner's Exhibit 1, Tab 5, the parties have divided all of their personal property, cars, personal effects, jewelry, clothing and furniture, fixtures and appliances. Each

party should be awarded those items of personal property as contained in this Exhibit. In order to even out the equity in the tangible personal property, a judgment should be awarded to Petitioner and against Respondent in the sum of $2,638.65.

17. As per Petitioner's Exhibit 1, Tab 6, the parties divided their marital accounts and stock. Pursuant to a prior Order of this Court, counsel for Petitioner is holding the sum of $10,000.00. This sum shall be divided as follows: $9,050.00 to Petitioner and $950.00 to Respondent.

18. As per Petitioner's Exhibit 1, Tab 7, the parties divided their marital and other debts. Based on this division, Respondent shall pay to Petitioner the sum of $3,255.90 in order to equalize said debts.

19. As per Petitioner's Exhibit 1, Tab 8, the parties divided their marital residence sale proceeds. Based on this division, Petitioner should receive the following amounts: all receive $817.76 for fees associated with the cleaning of the former marital residence, and Petitioner shall receive the sum of $3,999.00 currently being held in escrow by Equity Title. Respondent should be credited with the sum of $7,000.00, which is further discussed below herein.

20. The parties acknowledge that they have accrued retirement or deferred compensation plans during the marriage. Each party should be awarded his or her own retirement account acquired through his or her own employment, free and clear of any claim or interest of the other party.

21. Each party should be awarded any and all other marital assets or monies held in his or her own name.

22. The parties should be ordered to file separate tax returns for the year 2006, with each party paying his or her individual any net liability due or receiving his or her net refund.

23. Each party should be ordered to pay his or her own court costs and attorney's fees incurred in this matter. However, this does not release Respondent from the prior attorney's fees judgment of $600.00, which Respondent is still ordered to pay.

24. Taking all the judgment amounts contained in this Findings of Fact and Conclusions of Law, the following net judgment should be entered:

Judgments in Favor of Petitioner	Judgments in Favor of Respondent
$ 2,638.65 Para 16	
$ 9,050.00 Para 17	$ 950.00 Para 17
$ 3,255.90 Para 18	
$ 817.76 Para 19	$7,000.00 Para 19
$ 3,999.00 Para 19	
$ 600.00 Para 23	
$20,360.41	$7,950.00

Thus, of the $7,000.00 being held by Equity Title for Respondent and the $950.00 being held by counsel for Petitioner for Respondent, the following amounts are deducted: $2,638.65 + $3,255.90 + 817.76 + $600.00 = $7,312.31. Or put another way, the $7,000.00 being held by Equity Title and $312.31 being held by counsel for Petitioner is awarded to Petitioner. Petitioner's counsel should execute a check for the sum of $637.69 to Respondent to equalize all amounts. All sums then being held by Equity Title are awarded to Petitioner as well as all sums being held by counsel for Petitioner.

25. Each party should be ordered to execute and deliver all necessary documents to transfer the title and ownership of the property of the parties pursuant to the Decree entered herein.

BASED on the foregoing Findings of Fact, the court now makes and enters the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties of this action and the subject matter of this action.

2. Petitioner should be awarded an Amended Decree of Divorce dissolving the bonds of matrimony hereto existing between the parties, the same to become final and effective immediately upon being signed by the court and entered by the clerk.

3. The Amended Decree of Divorce should be in conformance with the foregoing Findings of Fact and Conclusions of Law.

DATED this _____ day of OCT 13 2006, 2006.

BY THE COURT

Pamela G. Heffernan
Second Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served on Respondent by mailing a true and correct copy to:

Loren Pearce
650 South 1600 East
Pleasant Grove, Utah 84062

on the 11 day of Oct, 2006.

RULE 4–903. UNIFORM CUSTODY EVALUATIONS

Intent:

To establish uniform guidelines for the preparation of custody evaluations.

Applicability:

This rule shall apply to the district and juvenile courts.

Statement of the Rule:

(1) Custody evaluations shall be performed by persons with the following minimum qualifications:

(1)(A) Social workers who hold the designation of Licensed Clinical Social Worker or equivalent license by the state in which they practice may perform custody evaluations within the scope of their licensure.

(1)(B) Doctoral level psychologists who are licensed by the state in which they practice may perform custody evaluations within the scope of their licensure.

(1)(C) Physicians who are board certified in psychiatry and are licensed by the state in which they practice may perform custody evaluations within the *scope of their licensure.*

(1)(D) Marriage and family therapists who hold the designation of Licensed Marriage and Family Therapist (Masters level minimum) or equivalent license by the state in which they practice may perform custody evaluations within the scope of their licensure.

(2) Every motion or stipulation for the performance of a custody evaluation shall include:

(2)(A) the name, address, and telephone number of each evaluator nominated, or the evaluator agreed upon;

(2)(B) the anticipated dates of commencement and completion of the evaluation and the estimated cost of the evaluation;

(2)(C) specific factors, if any, to be addressed in the evaluation.

(3) Every order requiring the performance of a custody evaluation shall:

(3)(A) require the parties to cooperate as requested by the evaluator;

(3)(B) restrict disclosure of the evaluation's findings or recommendations and privileged information obtained except in the context of the subject litigation or other proceedings as deemed necessary by the court;

(3)(C) assign responsibility for payment;

(3)(D) specify dates for commencement and completion of the evaluation;

(3)(E) specify any additional factors to be addressed in the evaluation;

(3)(F) require the evaluator to provide written notice to the court, counsel and parties within five business days of completion (of information-gathering) or termination of the evaluation and, if terminated, the reason;

(3)(G) require counsel or parties to schedule a settlement conference with the court and the evaluator within 45 days of notice of completion or termination unless otherwise directed by the court so that evaluator may issue a verbal report; and

(3)(H) require that any party wanting a written custody evaluation to be prepared give written notice to the evaluator after the settlement conference.

(4) In divorce cases where custody is at issue, one evaluator may be appointed by the court to conduct an impartial and objective assessment of the parties and submit a written report to the court When one of the prospective custodians resides outside of the jurisdiction of the court two individual evaluators may be appointed. In cases in which two evaluators are appointed, the court will designate a primary evaluator. The evaluators must confer prior to the commencement of the evaluation to establish appropriate guidelines and criteria for the evaluation and shall submit only one joint report to the court.

(5) The purpose of the custody evaluation will be to provide the court with information it can use to make decisions regarding custody and parenting time arrangements that are in the child's best interest. This is accomplished by assessing the prospective custodians' capacity to parent, the developmental, emotional, and physical needs of the child, and the fit between each prospective custodian and child. Unless otherwise specified in the order, evaluators must consider and respond to each of the following factors:

(5)(A) the child's preference;

(5)(B) the benefit of keeping siblings together;

(5)(C) the relative strength of the child's bond with one or both of the prospective custodians;

(5)(D) the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted;

(5)(E) factors relating to the prospective custodians' character or status or their capacity or willingness to function as parents, including:

(5)(E)(i) moral character and emotional stability;

(5)(E)(ii) duration and depth of desire for custody;

(5)(E)(iii) ability to provide personal rather than surrogate care;

(5)(E)(iv) significant impairment of ability to function as a parent through drug abuse, excessive drinking or other causes;

(5)(E)(v) reasons for having relinquished custody in the past;

(5)(E)(vi) religious compatibility with the child;

(5)(E)(vii) kinship, including in extraordinary circumstances stepparent status;

(5)(E)(viii) financial condition; and

(5)(E)(ix) evidence of abuse of the subject child, another child, or spouse; and

(5)(F) any other factors deemed important by the evaluator, the parties, or the court.

(6) In cases in which specific areas of concern exist such as domestic violence, sexual abuse, substance abuse, mental illness, and the evaluator does not possess specialized training or experience in the area(s) of concern, the evaluator shall consult with those having specialized training or experience. The assessment shall take into consideration the potential danger posed to the child's custodian and the child(ren).

(7) In cases in which psychological testing is employed as a component of the evaluation, it shall be conducted by a licensed psychologist who is trained in the use of the tests administered, and adheres to the ethical standards for the use and interpretation of psychological tests in the jurisdiction in which he or she is licensed to practice. If psychological testing is conducted with adults and/or children, it shall be done with knowledge of the limits of the testing and should be viewed within the context of information gained from clinical interviews and other available data. Conclusions drawn from psychological testing should take into account the inherent stresses associated with divorce and custody disputes.

[Amended effective May 15, 1994; April 1, 2003; November 1, 2003.]

Advisory Committee Note

The qualifications enumerated in this rule are required for the performance of a custody evaluation. However, if the qualifications are met, a practitioner from another state with a different title will not be barred from performing a custody evaluation.

Library References

Child Custody ⇐400.
Westlaw Key Number Search: 76Dk400.
C.J.S. Parent and Child §§ 94, 203.

Notes of Decisions

1. Construction and application

Rule requiring that psychological evaluations in child custody proceedings be performed by psychologists licensed by state in which they practice did not apply to proceedings to terminate parental rights. Judicial Administration Rule 4–903(1)(B). State in Interest of G.Y., 1998, 962 P.2d 78, 346 Utah Adv. Rep. 31. Infants ⇐ 208

2. Reports that may be considered

Trial court could consider recommendation from independent evaluator in making child custody determination, where both parents stipulated to request for independent evaluation as to custody Judicial Administration Rule 4–903(2). Linam v. King, 1991, 804 P.2d 1235. Stipulations ⇐ 14(1)

Child custody evaluation report could be relied on in making custody determination, even though report was not formally admitted into evidence and evaluator was never qualified as expert or called as witness at trial. Judicial Administration Rule 4–903; Rules of Evid., Rule 706(a). Merriam v. Merriam, 1990, 799 P.2d 1172. Child Custody ⇐ 421; Child Custody ⇐ 451

3. Previously determined arrangements

Existing child custody arrangements in which the child has thrived should be disturbed only if the court finds compelling circumstances. U.C.A.1953, 30–3–10.4; Judicial Administration Rule 4–903. Hudema v. Carpenter, 1999, 989

Note 3

P.2d 491, 380 Utah Adv. Rep. 3, 1999 UT App 290. Child Custody ⇐ 552

4. Religious compatibility

Only when the parents' religiously based actions, either in their own right or by conflicting with the child's religious identity, negatively impact the child, as by compromising his health or safety, or by interfering with the stability and continuity in his life, or by diminishing the child's self image, should the religious compatibility factor be used to favor custody by one parent over the other. U.C.A.1953, 30–3–10.4; Judicial Administration Rule 4–903. Hudema v. Carpenter, 1999, 989 P.2d 491, 380 Utah Adv. Rep. 3, 1999 UT App 290. Child Custody ⇐ 46

RULE 4–904. Repealed

Historical Notes

Rule 4–904, repealed in 1989, related to child support guidelines.

RULE 4–905. Repealed effective November 1, 2003

Historical Notes

The repealed rule related to domestic pretrial conferences and orders.

RULE 4–906. GUARDIAN AD LITEM PROGRAM

Intent:

To establish the responsibilities of the Guardian ad Litem Oversight Committee established in Rule 1–205.

To establish the policy and procedures for the management of the guardian ad litem program.

To establish responsibility for management of the program.

To establish the policy and procedures for the selection of guardians ad litem.

To establish the policy and procedures for payment for guardian ad litem services.

To establish the policy and procedures for complaints regarding guardians ad litem and volunteers.

Applicability:

This rule shall apply to the management of the guardian ad litem program.

This rule does not affect the authority of the Utah State Bar to discipline a guardian ad litem.

Statement of the Rule:

(1) *Guardian ad Litem Oversight Committee.* The Committee shall:

(1)(A) develop and monitor policies of the Office of the Guardian ad Litem to:

(1)(A)(i) ensure the independent and professional representation of a child-client and the child's best interest; and

(1)(A)(ii) ensure compliance with federal and state statutes, rules and case law;